TOPICAL INDEX

Page

Jurisdiction 2

Opinion Below 2

Statutes Involved 3

Brief Statement of Facts 7

Questions Presented by This Writ 14

Specification of Errors and Arguments

I. The District Court of Appeal of the State of California erred in holding that the Fourteenth Amendment was not violated by the use in the trial of a Negro of a purported oral confession secured after Appellant had been unlawfully arrested, locked up in jail, and held without reasonable and probable cause, without friend or counsel 15, 20

II. The District Court of Appeal of the State of California erred in holding that a purported oral confession secured during illegal detention prior to prompt arraignment which prompt arraignment is required by California law may be used as evidence without violating due process of law guaranteed by the Fourteenth Amendment to the United States Constitution 15, 22

III. The District Court of Appeal of the State of California erred in holding that a purported oral reply to an oral accusatory

Page

statement, while a Negro defendant is alone, friendless and without counsel, is admissible in evidence without violating the Fourteenth Amendment to the United States Constitution 15, 26

Reasons for Granting the Writ 16

Cases and Statutes Believed to Sustain Jurisdiction 17

Motion for Leave to Proceed Upon Typewritten Copy of the Record 32

TABLE OF CASES AND AUTHORITIES CITED

Cases

Boyd v. U. S., 116 U. S. 616 17

Bram v. U. S., 168 U. S. 532 ..... 17, 27

Brinegar v. United States, 165 Fed. 2d 512 23

Brown v. Mississippi, 297 U. S. 278 ..... 17, 21, 27

Carignan v. U. S., 185 F. (2d) 954 27

Chambers v. Florida, 309 U. S. 207 ..... 17, 21

De Meerleer v. Michigan, 329 U. S. 663 17

Johnson v. Zerbst, 304 U. S. 458 17

Lisenba v. California, 314 U. S. 219 ..... 17, 21, 27

Lomax v. Texas, 313 U. S. 544 21

Malinski v. New York, 324 U. S. 401 ..... 17, 21

McDonnell v. U. S., 335 U. S. 451 31

McNabb v. U. S., 318 U. S. 332; 87 L. Ed. 819 ..... 17, 23

Olmsted v. United States, 277 U. S. 438 23

Page

People v. Jones, (1944) 24 Cal. 2d 601, 609, 150 L. Ed. 801 29
People v. Simmons, 28 Cal. (2d) 699 26
People v. Stroble, 226 Pac. 2d 330, 26 Pac. 2d 1615 9
Powell v. Alabama, 287 U. S. 45 17
Rochin v. People of the State of California, 95 L. ed. 915 ..... 8, 20, 27
Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. Ed. 319 24
Smith v. O'Grady, 312 U. S. 329; 85 L. Ed. 859 17
Upshaw v. U. S., 335 U. S. 410 ..... 17, 23, 27, 31
United States v. Hoffman, C.C.A. 2d N. Y., 137 F. 2d 426 23
Ward v. Texas, 316 U. S. 547; 86 L. Ed. 1663 17
Watts v. Indiana, 338 U. S. 49, 93 L. Ed. 1801 31
Weeks v. U. S., 232 U. S. 383 17
White v. Texas, 310 U. S. 530; 84 L. Ed. 1342 ..... 17, 21, 27

Codes, Statutes, etc.

Fourteenth Amendment, Constitution of the United States 3, 14, 16
Penal Code,
Section 145 4
Sections 834, 835, 836 5
Section 841 6
Section 849 3
Section 4004 ..... 4, 8

Page

Rule 5, Rules of Criminal Procedure for the District Courts of the United States 6
Rule 38½ Rules of the Supreme Court of the United States 2
Section 11500 Health & Safety Code 3
Title 28, Section 2101 U. S. Codes 2, 17

IN THE

SUPREME COURT

OF THE

United States

October Term, 1951

No. _____

HARRY BIGELOW,
Petitioner and Appellant,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent and Appellee.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Fred M. Vinson and to the Honorable Associate Justices of the said Courts:

Comes now HARRY BIGELOW and petitions your Honorable Court for a writ of certiorari directed to the District Court of Appeal of the State of California, Second Appellate District, Division Three and in respect thereto sets forth as follows:

JURISDICTION

Jurisdiction is conferred by Title 28, Section 2101 U. S. Codes and by Rule 38½ Rules of the Supreme Court of the United States. The District Court of Appeals rendered judgment May 23, 1951. The Supreme Court of California denied a hearing June 21, 1951. This Petition is filed within ninety days thereof as provided by Rule 38½, Rules Supreme Court of the United States.

OPINION BELOW

The Opinion of the District Court of Appeal is to be found at page 167 of the Record. It is also reported at 231 Pac. (2d) 881 in the Pacific Reporter advance sheets.

STATUTES INVOLVED

SECTION 11500 HEALTH & SAFETY CODE:

"§11500. *Possession, etc., of narcotic forbidden.* Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport a narcotic except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State."

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PENAL CODE, SECTION 849:

"§849. [Persons arrested without warrant to be taken before nearest magistrate: Complaint to be laid.] When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint stating the charge against the per-

son, must be laid before such magistrate. [Enacted 1872; Am. Stats. 1935, p. 874.]"

PENAL CODE, SECTION 145:

"§145. *Delaying to take person arrested before a magistrate.* Every public officer or other person, having arested any person upon a criminal charge, who wilfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor."

PENAL CODE, Section 4004:

"§4004. [*Necessity for actual confinement of persons committed for examination or convicted after trial: Escapes: Authority of courts to order removal of prisoners.*] A prisoner committed to the county jail for trial or for examination, or upon conviction for a public offense, must be actually confined in the jail until he is legally discharged; and if he is permitted to go at large out of the jail; except by virtue of a legal order or process, it is an escape; provided, however, that during the pendency of a criminal proceeding, the court before which said proceeding is pending may make a legal order, good cause appearing therefor, for the removal of the prisoner from the county jail in custody of the sheriff; and provided further, that the superior court of the county may make a legal order, good cause appearing therefor, for the removal of prisoners confined in the county jail, after conviction, in the custody of the sheriff. [Added by Stats. 1941, ch. 106, §15.]"

PENAL CODE, SECTION 834:

"§834. *Arrest defined: By whom made.* An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace-officer or by a private person."

PENAL CODE, SECTION 835:

"§835. *How an arrest is made and what restraint allowed.* An arrest is made by an actual restraint of the person of the defendant or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention."

PENAL CODE, SECTION 836:

"§836. *Arrests by peace officers:* [*Arrest under warrant or without warrant in certain cases authorized*]. A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence.
2. When a person arrested has committed a felony, although not in his presence.
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.
4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.
5. At night, when there is reasonable cause to believe that he committed a felony."

PENAL CODE, SECTION 841:

"§841. *Arrest, how made:* [*Exceptions*]. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape."

RULE 5, RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES:

"(a) APPEARANCE BEFORE THE COMMISSIONER. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) STATEMENT BY THE COMMISSIONER. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to

consult counsel and shall admit the defendant to bail as provided in these rules."

BRIEF STATEMENT OF FACTS

The Petitioner is a Negro. On the night of April 13, Deputy Sheriff Widel Smith of the Sheriff's Narcotic Detail observed the defendant leave a house at 1134 East 127th Street, Los Angeles, about 6:30 P.M. (R. 15). He and two other officers followed the defendant, stopped him and searched him (R. 15) and questioned him. They found nothing. They then took him back to the house at 1134 East 127th Street and approached the door. The officer rang the bell. The Deputy Sheriff identified himself to Miss Ivery, the occupant, not an appellant, and the petitioner spoke, asking her to open the door. Before she did, the officer forced entry into the house (R. 18). The officer said Florence Ivery—not an appellant—crumpled something in her fist as he entered which fell to the floor rug and the officer attempted to pick it up with a knifeblade. It was a tiny scraping of heroin. There was no conversation at the time (R. 20).

Without a warrant or any legal process a complete search of all the rooms of the Ivery premises followed (R. 20) for a period of 2½ hours (R. 45). The search was underneath tables, chairs, cabinets (R. 44). The officers did not find anything (R. 20). The officers then took the Petitioner (in technical custody), along with several other people who had entered the residence to the Sheriff Sub-Station for questioning (R.

21). Petitioner when questioned denied any connection with or use of narcotics. The officer testified that the petitioner said: "Florence used a little and he was trying to stop her from using it. (R. 23). Nevertheless, he was locked up in jail and stripped of all property—although search of him showed he did not possess any narcotic and there was no lawful reason to lock him up. Likewise Florence Ivery was locked up; a key to the house was taken by the Sheriff's office. (R. 32). Deputies Farrell, Sergeant Jones and Cecil Carpenter accompanied the officer and participated in these proceedings. This is the same Sheriff squad referred to in the case of *Rochin v. People of the State of California,* 95 L.ed. 915, better known as the stomach pumping case in which the officers pumped the stomach to get the evidence and which is now before this court for hearing. (October Term No. 450.)

After holding the petitioner BIGELOW in jail all night without a charge or without any reasonable or probable cause for his arrest or detention, the officers the next day took him out of jail and returned to the house on 127th Street (without Ivery, the resident). At that time appellant was in illegal custody, since no probable causes whatsoever for his arrest and he was not held by virtue of any warrant or other lawful process, nor is there any evidence that the officers, having once booked him, had any legal order to take the petitioner out of jail in custody. In California once a person is committed to a County jail it requires a court order to remove him from the jail while he is in detention. (Section 4004 California Penal Code). The of-

ficers had in their possession or under their control at all times from the time of the incarceration in jail of the petitioner and Florence Ivery, the key to the house on 127th Street. Taking the petitioner alone with them to this house the next day, the Sheriff Officers went directly to the bedroom of Florence Ivery and there made a purported search of the bedroom without any warrant or process. In a very short time they looked under a vanity dresser and underneath it picked up a sealed aluminum tube (R. 24), which contained 81 capsules of white powder (R. 25). Sergeant Jones (he of stomach pumping infamy) "picked it up from underneath the vanity in the rear bedroom at the location" (R. 26). There was no conversation with BIGELOW during the entire search (R. 26) which took place about 11 or 11:30 A.M. (R. 25). After "finding" the tube at the Ivery residence the officer asked Bigelow if the "stuff" he had found belonged to him. Petitioner replied only: "Well, you are a good detective, aren't you?" The officer said he replied: "No, I just have a job to do, that is all."

During the search another person came into the residence (R. 28).

The Officers then took the Petitioner to the Sheriff's Narcotic Detail (R. 30) and not before any magistrate nor back to jail. In this private quarter they there again questioned him at length. He had not been arraigned before a magistrate as required by California law nor advised of his rights. In California the arraignment consists of advising the defendant of his

constitutional rights, including one that he is entitled to counsel at all stages of the proceedings. It also consists of fixing bail for release. BIGELOW, instead, was kept in the private offices of the Sheriff without counsel or friends. The narcotic officers then claimed that during this period of private and illegal detention in their private offices, BIGELOW made the following oral confession:

> "A. At that time Sergeant Jones asked the defendant Harry Bigelow if the stuff found in the house was his. He says, I don't want you to say that it is yours if it isn't. The defendant Harry Bigelow said, 'Well, the stuff is mine.' And at that time Sergeant Jones asked him again, he said, 'Well, I don't want you to say this is yours if it isn't,' and the defendant Harry Bigelow says, 'Well, I am not saying it just to be saying it, I am saying it because it is mine.'" (R. 31).)

Another officer, David Carpenter, testified to the purported oral confession in the Sheriff's office, as follows:

> "A. In the Sheriff's Narcotic office, that of Sergeant Jones, the defendant Harry Bigelow, Florence Ivery, Sergeant Jones and myself, and I believe Tom Farrell, deputy sheriff—Sergeant Jones asked him if that stuff belonged to him, asked Harry Bigelow, I mean. Harry Bigelow says, 'I will take the blame for that, it is mine.' And Sergeant Jones told him, he said, 'I don't want you to take the blame for anything that doesn't belong to you, if it belongs to you, say so.'

And Harry Bigelow says, 'Yes, that is mine. She has a previous narcotic rap on her.' " (R. 58, 59.)

Florence Ivery testified she lived at the house with her daughter, Eunice Ivery, (R. 71), that the petitioner had never lived there; that the house was purchased in 1946 with intentions of getting married, but they didn't (R. 71).

Petitioner BIGELOW denied the purported confession. (R. 94.) Prior to that at the search at the house he said officer Smith produced this cigar cylinder and asked him if he knew anything about it, and he said "No". (R. 93). Officer Smith told Petitioner he didn't have a chance—whatever charge they put against him.

Petitioner gave officers to understand that before he would talk he wanted a lawyer (R. 110).

Petitioner denied seeing the alleged narcotic in the cylinder even up to the day of trial. (R. 113.)

As the officers were riding with Petitioner to the Sheriff's office they told him they were going to get him. (R. 115.)

The Petitioner manages three fighters and is road manager for a band (R. 117).

The court only gave one instruction on "confession," as follows: (R. 142.)

29.

"DEFINITIONS OF CONFESSION AND ADMISSION:

Evidence has been received in this case tending to show that on an occasion or occasions other than this trial defendant made a statement or statements tending to prove guilt of the alleged crime for which he is on trial.

[A statement thus made by a defendant may be either a confession or an admission.]

A confession is a statement that was made by one who is a defendant in a criminal trial, at a time when he was not testifying in that trial, by which he acknowledged certain conduct of his own that constituted a crime for which he is on trial, a statement which, if true, discloses his guilt of that crime and excludes the possibility of a reasonable inference to the contrary.

If under my instructions you find that a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true; and in deciding that question you should consider all the circumstances connected with the making of the statement, as shown by the evidence. ~~But even if you should find that a confession was false, either entirely or in part, it remains, nevertheless evidence for your consideration, to be given such significance as your judgment may determine under instructions that I shortly shall give concerning false statements made by a person accused of crime.~~

[An admission is something less than a confession in that it does not concede so much pointing

toward defendant's guilt, and does not alone even if true, support a deduction of guilt. It may consist of any statement or other conduct by a defendant whereby he expressly or impliedly acknowledges a fact that contributes in some degree to the proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial.]"

No issue of the free and voluntary character of the confession was presented to or decided by the jury.

The due process questions under the 14th Amendment were first raised in the District Court of Appeal of the State of California and decided adversely to Petitioner. (R. 181-5.) They were again raised in the Supreme Court (R. 200-202; 203-7) which denied a hearing (R. 228).

QUESTIONS PRESENTED BY THIS WRIT

1. Was appellant denied procedural due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States when a purported oral confession was introduced in evidence which was purportedly secured after appellant had been illegally arrested without a warrant, and without probable cause, illegally jailed and removed from jail and was not represented by counsel or friends.

2. Does the illegal detention of a man and his removal from jail and the failure to comply with State procedural due process requiring arraignment without unnecessary delay void a purported oral confession obtained during the period when he was illegally held and bar its use in the trial?

3. Is an accused's purported oral reply to an accusatory oral statement admissible in evidence when it is allegedly obtained during a period of illegal detention by State officers when accused has not been arraigned, is friendless, alone, and without counsel as against officers using any means to obtain conviction?

SPECIFICATION OF ERRORS

I.

The District Court of Appeal of the State of California erred in holding that the Fourteenth Amendment was not violated by the use in the trial a Negro of a purported oral confession secured after Appellant had been unlawfully arrested, locked up in jail, and held without reasonable and probable cause, without friend or counsel.

II.

The District Court of Appeal of the State of California erred in holding that a purported oral confession secured during illegal detention prior to prompt arraignment which prompt arraignment is required by California law may be used as evidence without violating due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

III.

The District Court of Appeal of the State of California erred in holding that a purported oral reply to an oral accusatory statement, while a Negro defendant is alone, friendless and without counsel, is admissible in evidence without violating the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

This Court has held that where a purported confession is used in evidence which is obtained by illegal methods it voids the judgment of conviction under the Fourteenth Amendment to the Constitution of the United States.

Here the officers found nothing in the possession of the Petitioner, a colored man. They nevertheless locked him up in jail, kept him imprisoned without cause, removed him from the jail without any process, took him out to a lady friend's house for another search the next day, after having a key to the house in their possession after the first search, then claimed to have found a sealed metal tube containing a narcotic under her vanity chest, and holding him out for further illegal detention, took him to the Sheriff's Narcotic Detail and there secured a purported oral "confession." Such purported oral confession and its use in evidence under such circumstances vitiated the conviction under the Fourteenth Amendment.

Where there has been a violation of procedural due process by the use of an illegally gotten "confession" this court will itself examine the evidence and repeat the use at the trial of such illegally gotten confession.

And where it is secured during a period of illegal detention the court will also reject its later use in evidence.

The Court will consider also that the accused did not have the advice or benefit of counsel or friend.

CASES AND STATUTES BELIEVED TO SUSTAIN JURISDICTION.

Title 28, Section 2101, 2104;
Chambers v. Florida, 309 U. S. 207;
Bram v. U. S., 168 U. S. 532;
Brown v. Mississippi, 297 U. S. 278;
Lisenba v. California, 314 U. S. 219;
McNabb v. U. S., 318 U. S. 332; 87 L. Ed. 819;
Weeks vs. U. S. 232 U. S. 383;
Boyd v. U. S., 116 U. S. 616;
Powell v. Alabama, 287 U. S. 45;
White v. Texas, 310 U. S. 530; 84 L. Ed. 1342;
Ward v. Texas, 316 U. S. 547; 86 L. Ed. 1663;
Smith v. O'Grady, 312 U. S. 329; 85 L. Ed. 859;
Malinski v. New York, 324 U. S. 401;
De Meerleer v. Michigan, 329 U. S. 663;
Johnson v. Zerbst, 304 U. S. 458;
Upshaw v. U. S., 335 U. S. 410.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. _____

HARRY BIGELOW,
Petitioner and Appellant,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent and Appellee.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

To the Honorable Chief Justice Fred M. Vinson and to the Honorable Associate Justices of the United States Supreme Court:

Petitioner readopts his Jurisdictional Statement, Reference to Opinion Below, Statutes Involved and Summary of Facts set out in his petition.

ARGUMENT

I.

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA ERRED IN HOLDING THAT THE FOURTEENTH AMENDMENT WAS NOT VIOLATED BY THE USE, IN THE TRIAL OF A NEGRO, OF A PURPORTED ORAL CONFESSION SECURED AFTER APPELLANT HAD BEEN UNLAWFULLY ARRESTED, LOCKED UP IN JAIL, AND HELD WITHOUT REASONABLE AND PROBABLE CAUSE, WITHOUT FRIEND OR COUNSEL.

This is another one of those cases where a State has used an illegally gotten purported "confession" in evidence to convict the petitioner, a Negro. This "Narcotic Squad" which is known to resort to any methods to secure evidence (see *Rochin v. People of the State of California,* Misc. No. 450, October term, 1950, 95 L. Ed. 919) took appellant into custody without any rhyme or reason, compelled him to go back to a house occupied by a lady friend and her daughter, took him to the sheriff's office for questioning, and locked him (as well as the lady) in jail all night, without a warrant; had in their possession a key to the house; then the next day took him alone to the house and there claimed to have found under the ladies' dresser a sealed cigar cylinder containing narcotics. They then took him to the Sheriff's Narcotic Squad for further questioning, and claimed to have secured an oral "confession" that the "stuff is mine. She has a prior convic-

tion." The use of this "confession" which is the only evidence to connect appellant to the alleged "possession" violates due process guaranteed by the Fourteenth Amendment to the United States Constitution and voids the conviction.

Chambers v. Florida, 309 U. S. 227;
White v. Texas, 310 U. S. 530;
Lisenba v. California, 314 U. S. 219;
Malinski v. New York, 324 U. S. 401.

In *White v. Texas,* 310 U. S. 530, at page 532, the officers of Texas rode White around at midnight and used tactics to scare the negro. Here the officers locked the defendant up in jail, without any reason or charge, and then took him out to the house. He was without counsel, friends, or arraignment. At arraignment in California, bail is fixed by the magistrate enabling one to be released on bond.

Like *Brown v. Mississippi,* 297 U. S. 278, there is no other evidence against appellant but the purported oral confession. It violated due process.

The decision of the California Court is in conflict with those of this court.

White v. Texas, 310 U. S. 530;
Lomax v. Texas, 313 U. S. 544;
Chambers v. Florida, 309 U. S. 227;
Lisenba v. California, 314 U. S. 219;
Malinski v. New York, 324 U. S. 401.

II.

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA ERRED IN HOLDING THAT A PURPORTED ORAL CONFESSION SECURED DURING ILLEGAL DETENTION PRIOR TO PROMPT ARRAIGNMENT WHICH PROMPT ARRAIGNMENT IS REQUIRED BY CALIFORNIA LAW MAY BE USED AS EVIDENCE WITHOUT VIOLATING DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The appellant was arrested without reasonable and probable cause and thrown into jail and locked up over night. This was both physical and psychological pressure. The next day, at about 10:30 in the morning, and long after he had a right to be arraigned before a magistrate if there was any charge against him, he was taken out of the jail to the house at 127th Street (R. 23). At that time he was in illegal custody and there was no right of the officers to have him in this custody. Thereafter, and without any arraignment, they continued the illegal custody and took him to the Sheriff's Office, Narcotic Squad, where the illegal purported oral confession was made, (R. 31), which was probably in the afternoon of the same day, and without any arraignment, which prompt arraignment is required by due process of law in the State of California.

This Court has held, in *Upshaw v. United States,* 335 U. S. 410, that a confession of guilt is inadmissible in evidence where made by one who is arrested, during a 30-hour period while he was being detained by the police for interrogation, without being taken before the nearest available committing magistrate, and it adhered to the rules set out in *McNabb v. United States,* 318 U. S. 332, 87 L.Ed. 819.

The rule regarding prompt arraignment in the State Courts is applicable in this case because the failure to arraign the accused promptly results in the denial of bail and an involuntary confinement that works physical as well as psychological torture and pressure upon an accused, and the illegal confession resulting therefrom is "the fruit of the illegal detention" and the use of the purported confession by the State is the "use by it of the fruits of wrongdoings by its officers." Some courts have held that any confession obtained before commitment was inadmissible; *(United States v. Hoffman,* C.C.A. 2d N. Y., 137 F. 2d 426). Others have understood the case to determine admissibility of confessions by a coercion test, *(Brinegar v. United States,* 165 Fed. 2d 512). Under any test, the proceedings in this case were coercive and were the result of illegal detention. This Court has held that no court should benefit by the fruit of illegal detention; and, *here, we have the fruit of illegal detention.*

In *Olmsted v. United States,* 277 U. S. 438, Mr. Justice Brandeis said:

"The maxim of unclean hands comes from courts of equity, but the principle prevails also in courts of law. Its common application is in civil action between private parties. Where the government is the accuser, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling. . . . Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omni-present teacher . . . If the government becomes the law breaker, it breeds contempt for law. It invites every man to become a law unto himself. It invites anarchy."

In *Silverthorne Lumber Co. v. United States,* 251 U. S. 385, 64 L.Ed. 319, Mr. Justice Holmes said:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but it shall not be used at all."

In that case, the court was speaking of unlawful seizure of property by officers of the Department of Justice, who "without a shadow of authority, went to the office of their company and made a clean sweep of all the books, papers, and documents found there. All the employees were taken or directed to go to the office of

the district attorney of the United States, to which all the books, etc., were taken at once."

In the instant case the seizure was of the person of the defendant. Mr. Justice Holmes says:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by the forbidden act."

We respectfully submit that in civilized society neither the government or the state should be allowed to use the "fruits of its own wrongdoing" during the period of its illegal detention.

III.

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA ERRED IN HOLDING THAT A PURPORTED ORAL REPLY TO AN ORAL ACCUSATORY STATEMENT, WHILE A NEGRO DEFENDANT IS ALONE, FRIENDLESS AND WITHOUT COUNSEL, IS ADMISSIBLE IN EVIDENCE WITHOUT VIOLATING THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The law of California provides that an oral confession should be viewed with caution, and an oral reply to an oral accusatory statement by an officer is also held to be looked upon with caution and to be rejected.

People v. Simmons, 28 Cal. (2d) 699.

The question here, however, goes further, and was raised in the California Court of Appeal, and that is *Whether the use of such an alleged admission or confession to an accusatory statement by an officer, while the accused is without counsel, has not been arraigned, and is friendless and alone, made to deny the accusations of a multiple of officers, violates due processes of law guaranteed by the Fourteenth Amendment to the United States Constitution.*

There is no other evidence in the case against the appellant. Two officers who had had him detained for several hours and used physical and psychological pressure against him by such detention, took him from the jail to the house alone and then back to the Sheriff's

Office for questioning, and in response to a purported accusation he is alleged to have made the incriminatory reply. We submit that its use in evidence violated due process of law.

Bram v. United States, 168 U. S. 53;
Brown v. Mississippi, 297 U. S. 278;
White v. Texas, 310, U. S. 530, 84 L. Ed. 1342;
Lisenba v. California, 314 U. S. 219;
Upshaw v. U. S., 335 U. S. 410.

The case involves similar principles of law to those raised in the case of *People v. Stroble,* 226 Pac. 2d 330, 26 Cal. (2d) 615, which is now *Stroble v. People of the State of California,* set for consideration in this Honorable Court at the opening of the 1951 term of court, and *Rochin v. People of the State of California,* certiorari granted; *Carignan v. U. S.,* certiorari granted and others.

In the case of *People v. Stroble* the court said:

"We may assume, that as a matter of law under the circumstances shown, this first confession was the result of physical abuse or psychological torture or a combination of the two (cf. *Watts v. Indiana* (1949), 338 U. S. 49, 69 S. Ct. 1347, 1357, 93 L. Ed. 1801; *Turner v. Pennsylvania* (1949), 338 U. S. 62, 69 S. Ct. 1352, 1357, 93 L. Ed. 1810; *Harris v. South Carolina* (1949), 338 U. S. 68, 69 S. Ct. 1354, 1357, 93 L. Ed. 1815, reversing convictions because of the admission of confessions elicited after intensive questioning by relays of

officers for hours a day over periods of days). We may further assume that from the record it appears as a matter of law that defendant, although legally sane, was of somewhat weakened mentality (the result of arteriosclerosis and the excessive use of alcohol), and that this first confession was the result of terror indubitably following from the slap by the park foreman, the repeated acts of battery by the arresting officer when he searched defendant, and the presence of 19 law enforcement officials and 5 stenographers while defendant was questioned. The introduction in evidence of such a confession, if it were material at all, would offend the due process clause of the Fourteenth Amendment. (See *Ashcraft v. State of Tennessee* (1944), 322 U. S. 143, 154, 64 S. Ct. 921, 88 L. Ed. 1192; *Haley v. State of Ohio* (1948), 332 U. S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224; see also *Foster v. State of Illinois* (1947), 332 U. S. 134, 137, 67 S. Ct. 1716, 91 L. Ed. 1955; *Gibbs v. Burke* (1949), 337 U. S. 773, 781, 69 S. Ct. 1247, 93 L. Ed. 1686. But here the use of the first confession could not have affected the fairness of defendant's trial, because defendant thereafter made at least five confessions, of materially similar substance and unquestioned admissibility, which were put in evidence. It does not appear that the outcome of the trial would have differed if the first confession had been excluded, nor does it appear that the coercive influence surrounding the first confession continued to operate on the mind of defendant and induce subsequent confessions which were made after defendant had con-

sulted with counsel and been taken before a magistrate (cf. *People v. Jones* (1944), 24 Cal. 2d 601, 609, 150 L. Ed. 801).

Violation of Defendant's Rights to Be Taken Before a Magistrate and to Counsel Immediately After His Arrest.

. . . The above described procedure was in violation of section 8 of article I of the state Constitution, which provides 'When a defendant is charged with the commission of a felony, by a written complaint subscribed under oath and on file in a court within the county in which the felony is triable, he shall, without unnecessary delay, be taken before a magistrate of such court. The magistrate shall immediately deliver to him a copy of the complaint, inform him of his right to the aid of counsel, and allow him a reasonable time to send for counsel.' It apparently was also in violation of section 825 of the Penal Code, which provides, 'The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sunday and holidays; and after such arrest, any attorney at law entitled to practice in the court of record of California, may at the request of the prisoner or any relative of such prisoners, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow any attorney to visit the prisoner is guilty of misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when prop-

er application is made therefor shall forfeit any pay to the party aggrieved the sum of five hundred dollars, to be recovered by action in any court of competent jurisdiction.' (See also Pen. Code, §848: 'An officer making an arrest, in obedience to a warrant, must proceed with the person arrested as commanded by the warrant, or as provided by law'; §814 [form of warrant; 'you are . . . commanded forthwith to arrest the above named C. D. and bring him before me . . . or . . . before the nearest or most accessible magistrate in this county']; §145 [wilful delay in taking before magistrate is misdemeanor]; §858 ['when the defendant is brought before a magistrate upon an arrest . . . on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings'].) It is apparent that here the delay in taking defendant before a magistrate (where defendant would have been advised of his right to counsel) was 'unnecessary,' for a municipal court open for business was located in the same building as the office where defendant was held and questioned, but defendant was not taken to such court; even after the questioning he was taken from that building for further examination by a physician. It is also apparent that defendant should have been allowed to see Mr. Gray, who was present at the request of defendant's son-in-law, a 'relative of such prisoner' (Pen. Code, §825)."

See also the following cases, *Watts v. Indiana,* 338 U. S. 49, 93 L. Ed. 1801; *Upshaw v. U. S.,* 335 U. S. 410; *McDonnell v. U. S.,* 335 U. S. 451.

This case presents for consideration principles involved in Rochin v. California, No. 450, Dixon v. Duffy, No. 328, October Term 1950, set for argument this term, Stroble v. People of the State of California, Carignan v. U. S., 185 F. (2d) 954 petition for certiorari granted and pending and Haines v. U. S., No. 174 this term. Each should be heard together and argued at the same time.

Wherefore petitioner prays that this Honorable Court grant certiorari and that the judgment below be reversed.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

[TITLE OF COURT AND CAUSE.]

MOTION FOR LEAVE TO PROCEED UPON TYPEWRITTEN COPY OF THE RECORD

COMES NOW Harry Bigelow and moves this Honorable Court for leave to proceed upon the typewritten record on appeal, as he did in the California courts.

The appellant is a negro and is able to pay the filing fee but would have difficulty in paying the cost of printing the record on appeal.

WHEREFORE, appellant asks leave of court to proceed upon the certified typewritten record filed with the case.

MORRIS LAVINE,
Attorney for Appellant.